

LEGISLATIVE REFERENCE BUREAU

The Internal Improvements Clause

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Wisconsin Constitution, Article VIII, Section 10

[T]he state may never contract any debt for works of internal improvement, or be a party in carrying on such works.

In the American form of government, the legislative power of a state legislature is plenary. Unlike Congress, which may exercise only those powers granted to it under the U.S. Constitution, the Wisconsin legislature may exercise all legislative power not prohibited by the Wisconsin or U.S. Constitutions. One limit the Wisconsin Constitution places on the legislature's otherwise plenary power is a ban on the state's participation in "works of internal improvement." Under the internal improvements clause, the state may not "contract any debt for works of internal improvement" and may not "be a party in carrying on such works," subject to certain exceptions.¹

It is perhaps not obvious to the modern reader what "works of internal improvement" are, and a review of the relevant case law demonstrates that the Wisconsin Supreme Court has had considerable difficulty deciding that question for itself. One commentator quipped that the "vague limiting principles of the internal improvements clause bedevils debate."² Others have in part pointed to bewildering court decisions in calling for its repeal.³ The clause was at one time considered the most frequently interpreted limiting provision of the state's constitution.⁴ Yet today it remains unclear what the internal improvements clause actually means—its meaning may be more obscure now than ever. The Wisconsin Supreme Court's last decision construing the internal improvements clause occurred more than 20 years ago. In the lengthening shadow of that decision, the larger question that presents itself is whether the internal improvements clause has any life left of its own apart from the basic rule that all government expenditures must be for some public purpose.

Historical context

While the Wisconsin Supreme Court has had difficulty over the years saying what the

1. Wis. Const. art. VIII, § 10. The original internal improvements clause ratified in 1848 included an exception for situations in which the state receives a grant of land or other property specifically dedicated to particular works of internal improvement. A series of constitutional amendments throughout the twentieth century added further exceptions allowing the state to appropriate money or raise taxes to carry out the construction or improvement of public highways (1908); the acquisition, preservation, and development of the state's forests (1924); the development, improvement, and construction of airports or other aeronautical projects (1945); the acquisition, improvement, or construction of veterans housing (1949); the improvement of port facilities (1960); and the acquisition, development, improvement, or construction of railways and other railroad facilities (1992).

2. Gordon B. Baldwin, *Introduction: Celebrating Wisconsin's Constitution 150 Years Later*, 1998 Wis. L. Rev. 661, 674.

3. David M. Hecht & Frank L. Mallare, Comment, *Wisconsin's Internal Improvements Prohibition: Obsolete in Modern Times?*, 1961 Wis. L. Rev. 294; William F. Eich, *A New Look at the Internal Improvements and Public Purpose Rules*, 1970 Wis. L. Rev. 1113.

4. *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464, 490, 235 N.W.2d 648 (1975) ("No limiting constitutional provision in our Wisconsin Constitution has been subjected to more interpretation.").

internal improvements clause means, the decisions of the court⁵ are unanimous in the conviction that it is essential first to understand the historical situation, and in particular the economic realities, from which the internal improvements clause emerged.

Settlers of the Wisconsin Territory, and later the framers of the state's constitution, were well acquainted with controversies surrounding government involvement in works of internal improvement. The term "internal improvements" first came into popular usage in America in the late 1700s and referred broadly to investment in infrastructure projects.⁶ Following the American Revolution, significant public support existed for improvements to the country's transportation infrastructure—at that time, roads, turnpikes, canals, and harbors—in order to bolster the fledgling economy and improve communication. Early internal improvement projects were generally supported by a mix of public and private funding. The most prominent projects undertaken in the early 1800s were turnpikes, essentially toll roads, which were generally owned by private companies receiving public subsidies.

As the frontier stretched westward, lawmakers recognized the need for better inland transportation. In 1808, at the request of the U.S. Senate, Albert Gallatin, secretary of the treasury under President Thomas Jefferson, submitted a report recommending that the federal government oversee the construction of a vast system of canals and roads at an estimated cost of \$20 million in tariff revenue.⁷ Gallatin, himself Swiss-born, was familiar with the extensive canal systems in Europe and believed the United States needed similar infrastructure in order to compete with other nations. Gallatin's plan, however, received significant opposition. Opponents argued that Gallatin's plan would lead to the construction of unnecessary projects, the benefit of some states, and even of some populations within states, at the expense of others, and the opportunity for public officials to engage in graft. Some contended the federal government lacked the constitutional authority to undertake internal improvements. Deliberations over Gallatin's plan ground to a halt with the War of 1812, as the country's attention turned to the war effort.

In 1817, Representative John C. Calhoun of South Carolina revived the internal improvements debate when he introduced legislation to create a permanent fund for a nationwide system of internal improvements. He asserted it was the duty of Congress to "bind the republic together with a perfect system of roads and canals."⁸ Debate over Calhoun's proposal substantially mirrored that surrounding Gallatin's plan. In addition,

5. In all of the cases addressing the internal improvements clause, the action was either filed directly with the Wisconsin Supreme Court or was appealed from the circuit court directly to the Wisconsin Supreme Court. There are no decisions of the Wisconsin Court of Appeals construing the internal improvements clause. Therefore, all references herein to "the court" refer to the Wisconsin Supreme Court.

6. JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* 3 (2001).

7. ALBERT GALLATIN, *REPORT OF THE SECRETARY OF THE TREASURY ON THE SUBJECT OF PUBLIC ROADS AND CANALS* (R.C. Weightman Print 1808).

8. THOMAS HART BENTON & JOHN C. RIVES, *ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856*, at 706 (1858).

representatives from older, eastern states worried that an internal improvements fund would send more settlers west, depleting the populations of eastern states and establishing competing states. Congress narrowly passed Calhoun's bill, known as the Bonus Bill, but President James Madison vetoed the bill on his last day in office. Although he acknowledged the great need for improved transportation infrastructure, Madison determined that Congress did not have the power to create a system of internal improvements because that power was not expressly given by the Constitution.⁹

With the failure of the Bonus Bill, states assumed responsibility for government-funded internal improvements. In 1817, New York was the first state to undertake a significant internal improvement project with the construction of the Erie Canal. The project, which cost the state \$7 million, initially faced significant opposition, but that opposition was short-lived. New York successfully completed the project in just eight years, and by 1837 revenue from the canal had completely erased the state's debt incurred to construct it. The canal significantly shortened the time and expense necessary to transport commodities within the state and opened up the state's western counties to increased commerce and development.

The success of the Erie Canal demonstrated the potential benefits of state-funded internal improvements, and many states rushed to follow suit, heralding an era known as the canal boom. In 1820, Virginia took control of an existing James River and Kanawha Canal project, funding it through the Virginia Board of Public Works. Pennsylvania began a statewide system of trunk and branch canals in 1826. Further westward, Ohio undertook the construction of two canals from Cleveland to Columbus and from Cincinnati to Dayton. Indiana, Illinois, and Michigan also commenced publicly funded canal projects throughout the 1820s.

Enthusiasm turned to regret, however, when many of these state-funded projects proved overambitious and largely sank as a result of shaky financing and political infighting.¹⁰ Many projects failed completely or were scaled back considerably because of cost overruns and technical difficulties. For the projects that were completed, toll revenues did not live up to expectations, often because projects were inspired more by political expediency than by market demand. Further compounding the situation was the Panic of 1837, a financial crisis that set off a recession lasting until 1843. The canal failures, coupled with the nationwide financial crisis, dragged many of the new inland states into deep debt and, in some cases, bankruptcy. By the 1850s, states that had once championed state-funded internal improvements, including Ohio, Indiana, Illinois, and Michigan, amended their constitutions to prohibit state involvement in works of internal improvement.

9. *Id.* at 666.

10. RICHARD SISSON, CHRIS ZACHER, & ANDREW CAYTON, *THE AMERICAN MIDWEST: AN INTERPRETIVE ENCYCLOPEDIA* 1391–92 (2006).

It was within this environment that Wisconsin took its first steps toward statehood. The framers of the Wisconsin Constitution, many of whom had come from states with failed canal projects, were fearful of public debt.¹¹ Although residents of the territory wanted internal improvements in order to accelerate commerce and development, the hard-learned lessons of other states convinced many in the territory that the evils of state participation in works of internal improvement far outweighed the benefits.¹² Such projects, many believed, should be left to local and private enterprise.

During the first state constitutional convention in 1846, early in the deliberations and with very little floor debate, the delegates adopted a provision directing the state government to encourage private companies to engage in works of internal improvement but prohibiting the state from participating in such works.¹³ Voters in the territory ultimately rejected the 1846 constitution but for reasons unrelated to the ban on internal improvements.

When a second state constitutional convention was assembled in 1847, floor debate over internal improvements was more vigorous. In general, delegates in favor of an outright ban on publicly funded internal improvements argued that such a ban was needed to avoid financial ruin, graft, and unequal benefits—all state residents being taxed for projects benefitting only some. Further, some delegates argued that public financing was unnecessary because private enterprise—exemplified in that era by the railroads—was up to the task.

In contrast, those who opposed an outright ban on state-sponsored internal improvements argued that some state involvement in the construction of infrastructure was inevitable and that appropriate protective measures could be put in place. For example, one of the convention's delegates, H.T. Sanders, offered draft language that would have allowed the state to assist with internal improvements under certain conditions, including subjecting each project to a referendum, requiring a separate tax levy for each project, and establishing an aggregate debt limit.¹⁴ In the end, the proponents of a ban on internal improvements prevailed, with only one exception for land and property granted to the state for particular works of internal improvement.¹⁵

11. Jack Stark, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE 170* (1997).

12. Hecht & Mallare, *supra* note 3 at 295.

13. See *THE CONVENTION OF 1846*, in *27 PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN* (Milo M. Quaife, ed., 1919).

14. *THE ATTAINMENT OF STATEHOOD, 1845–46*, in *29 PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN*, 416–17 (Milo M. Quaife, ed., 1919).

15. The Enabling Act passed by Congress to allow the Territory of Wisconsin to become a state included an offer stating that 5 percent of the net proceeds from the federal government's sale of certain lands would be paid to the state, provided that the state use the proceeds for certain internal improvements. Specifically, Congress wanted the new state to construct a canal from Lake Michigan to the Rock River and to improve the Fox and Wisconsin Rivers. *THE MOVEMENT FOR STATEHOOD, 1845–1846*, in *26 PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN*, 71 (Milo M. Quaife, ed., 1919).

Early cases

After Wisconsin achieved statehood, the earliest court cases dealing with the internal improvements clause primarily concerned not *what* the clause prohibits but *who* it prohibits. Those cases held that the internal improvements clause does not prohibit local units of government—cities, villages, towns, counties, special purpose districts—from incurring debt or otherwise participating in works of internal improvement.¹⁶ Instead, the prohibition on internal improvements applies only to the state.

It was not until after the turn of the twentieth century that the court attempted to say what the constitutional ban precludes. The court made that attempt in *State ex rel. Jones v. Froehlich*¹⁷ and *State ex rel. Owen v. Donald*.¹⁸

Froehlich concerned a law appropriating \$20,000 to construct and strengthen a levee system on the Wisconsin River for the purpose of protecting the city of Portage and surrounding areas from flooding. The court held that the project was an impermissible internal improvement.

Noting that the meaning of the words “internal improvements” is not self-evident,¹⁹ the court turned to the history surrounding the drafting of the internal improvements clause to try to construe its sense. The court recounted that over the course of the 25 years preceding ratification of the Wisconsin Constitution, the “pendulum of popular sentiment had swung to the extreme of opposition to [state participation in internal improvements].”²⁰ The court determined that “this quarter century of vehement discussion had produced a fairly definite conception of what had come to be designated ‘internal improvements.’”²¹ According to the court, “such conception included those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters.”²² The framers’ conception of internal improvements excluded, however, “those other things which primarily and preponderantly merely facilitate the essential functions of government.”²³ The court found that its understanding of the framers’ conception was bolstered by the decisions of courts in other midwestern states construing similar bans on internal improvements in their own state constitutions.²⁴

16. See, e.g., *Bushnell v. Beloit*, 10 Wis. 195, 221–22 (1860).

17. 115 Wis. 32, 91 N.W. 115 (1902).

18. 160 Wis. 21, 151 N.W. 331 (1915).

19. According to the court, “The words themselves are capable of including substantially every act within the scope of governmental activity which changes or modifies physical conditions within the limits of the commonwealth.” *Froehlich*, 115 Wis. at 36.

20. *Id.* at 37.

21. *Id.* at 38.

22. *Id.*

23. *Id.*

24. *Id.* at 39.

Applying that “fairly definite” conception of internal improvements—commentators and courts alike have since found it less than definite—the court concluded, “[W]e cannot doubt that, *prima facie*, levees or dikes to restrain the waters of a navigable river are works of internal improvement . . . , whether the main purpose be promotion of navigability, creation of water power, or reclamation of adjoining lands. In any of these there is enough of pecuniary benefit to warrant belief in the possibility, at least, that they may be undertaken by private enterprise or local associations.”²⁵ The court assumed for the sake of argument that the levee project also engendered the protection of life and property, but those interests alone did not demonstrate enough of a “governmental purpose” to change the result.²⁶ Instead, the court reasoned that many works may have a clear public purpose but still fall within the scope of the constitutional ban.²⁷ Such works, while forbidden to the state, may be delegated by the legislature to local units of government or left to private enterprise.²⁸

Under *Froehlich*, the state may engage in works that “merely facilitate the essential functions of government,” but may not engage in works for which “there is enough of pecuniary benefit to warrant belief in the possibility, at least, that they may be undertaken by private enterprise or local associations.” *Donald* gave that already expansive standard an even more sweeping application when it overturned an act establishing a major forest reserve scheme, including reforestation and the preservation of existing forest lands. The court held that the act involved the state in prohibited internal improvements.

The *Donald* court addressed itself in detail to the meaning of the words “internal improvements.” The court drew a distinction between the mid-nineteenth century popular understanding of those words and a broad principle of general application banning all public works save those that are essential to the functioning of government.²⁹ If, by using the words “internal improvements,” the framers understood only a species of public works—channels of trade and commerce, most notably canals—then the forest reserve scheme must stand because it did not entail what would traditionally have been thought of as works of internal improvement. But if the framers intended to declare a broad principle of general application, prohibiting state participation in public works, the forest reserve scheme must fall in the face of that principle.³⁰

The court felled the forest reserve scheme, for, building on *Froehlich*, the court determined that the framers did in fact intend to establish a broad principle of general application not limited to one particular class of internal improvements. The *Donald* court

25. *Id.* at 40–41.

26. *Id.* at 41–42.

27. *Id.*

28. *Id.*

29. *State ex rel. Owen v. Donald*, 160 Wis. 21, 69, 151 N.W. 331 (1915).

30. *Donald*, 160 Wis. at 71.

found that the “calamities which had befallen the people of neighboring and near-by states from the creation of debts and burdens of taxation for ‘works of internal improvement,’ had made a deep impression upon the people of the territory before the selection of delegates to formulate a constitution for the prospective new state.”³¹ According to the court, what those delegates aimed at “was the declaration of a principle *as broad as plain English words could make it . . .* of exclusive individual and local communal instead of state enterprise . . . and not [prohibition of] any particular class of internal improvements.”³²

In so holding, the court adopted a definition of “works of internal improvement” that the Minnesota Supreme Court had provided in 1894:

“Works of internal improvement,” as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government.³³

By adopting that definition, the *Donald* court self-consciously endorsed a judicial construction of the words “internal improvements” that “is far reaching,—extending far beyond construction or improvement of roads of various sorts, of canals, improvement of rivers and other facilities for trade and commerce.”³⁴ The court observed that a more forgiving standard had been applied in eastern states. However, a uniformly more exacting judicial construction had been applied in the states of the Midwest, where, the court said, “the necessity for the sweeping restriction was appreciated.”³⁵

The *Froehlich* and *Donald* courts construed the internal improvements clause as a sweeping restriction that far outstrips prohibition of only the kinds of major infrastructure projects that so preoccupied the mid-nineteenth century midwesterner. Under *Froehlich* and *Donald*, a project is prohibited unless it serves an essential governmental function and private capital does not exist to satisfy the need. The history of Wisconsin’s

31. *Id.* at 72–3.

32. *Id.* at 74–5 (emphasis added).

33. *Id.* at 79 (quoting *Rippe v. Becker*, 56 Minn. 100, 117, 57 N.W. 331 (1894)). *Froehlich* had also quoted the *Rippe* definition, among others.

34. *Id.*

35. *Id.* at 80. Of the approximately eight states whose constitutions still include some form of a general ban on state participation in internal improvements, five are in the Midwest—Kansas, Michigan, Minnesota, Ohio, and Wisconsin. Like the Wisconsin Constitution, those bans now typically include one or more exceptions. Ohio’s constitution merely prohibits debt for internal improvements. OHIO CONST. art. XII, § 6. A couple of states, while not banning internal improvements, require a supermajority vote of the legislature to pass a bill engaging the state in internal improvements. South Dakota is one such state. S.D. CONST. art. XIII, § 1.

internal improvements clause since *Froehlich* and *Donald*, beginning in particular with the Great Depression, shows considerable efforts by the Wisconsin Legislature to circumvent, and by the court to bend, the strictures of the internal improvements clause in order to accommodate shifting social and economic conditions within the state.³⁶

Legislative maneuverings

The earliest cases dealing with the internal improvements clause applied the constitutional ban only to the state. While that means that local units of government are exempted from the ban, it also means that other non-state entities acting at the state's behest could possibly benefit from that exemption as well. The legislature has taken advantage of that possibility first by using "dummy" corporations and later by using legislatively created authorities to engage in otherwise prohibited internal improvements, and the court has sanctioned those innovations.

Until 1969, the state regularly circumvented the internal improvements clause in often complex arrangements involving lease and sublease agreements between the state and dummy corporations established and controlled by the state. The typical arrangement involved (1) the state leasing land to a dummy corporation at a certain rent; (2) the dummy corporation borrowing money to finance the construction of improvements to the land; (3) the dummy corporation constructing the improvements; and (4) the dummy corporation leasing the property back to the state for a rent higher than that paid by the dummy corporation, at a rate calculated to finance and ultimately discharge the dummy corporation's debt.³⁷ The court approved such arrangements under the theory that "it is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it."³⁸ These arrangements were used not only for purposes of carrying out internal improvements but also to avoid constitutional limitations on the state's incurrence of debt.

But the legislature's use of dummy corporations came to an abrupt halt in 1969, the year in which the state's constitution was amended to prohibit the state from using dummy corporations. The same constitutional amendment authorized the state itself to contract public debt for construction projects without the need for an intermediary. Specifically, the amendment authorized the state to incur debt to "acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, railways, buildings, equipment or facilities for public purposes."³⁹ The internal improvements clause, however, was left in-

36. A number of constitutional amendments were also passed throughout the twentieth century, sometimes in response to adverse court decisions, to allow internal improvements with respect to such diverse projects as highways and housing for veterans. See note 1, *supra*.

37. See *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 72 N.W.2d 577 (1955).

38. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 425, 208 N.W.2d 780 (1973).

39. Wis. Const. art. VIII, § 7 (2) (a) 1.

tact. That creates an obvious tension: on the one hand, the state is broadly authorized to contract public debt for improvements to real property for public purposes; on the other hand, the state is prohibited from carrying on works of internal improvement and can no longer use dummy corporations to do so.⁴⁰

The legislature relieved that tension, at least in part, through the use of authorities. An authority is a “public body corporate and politic” that is created by statute, typically administered by a board composed of appointed officials, and has powers and duties established by law. Two current prominent examples of an authority are the Wisconsin Housing and Economic Development Authority (WHEDA), created under chapter 234 of the Wisconsin Statutes, and the Wisconsin Economic Development Corporation (WEDC), created under chapter 238 of the Wisconsin Statutes. The court has consistently held that an authority is not the state or an arm of the state and can engage in activities from which the state is constitutionally barred, including internal improvements. Moreover, the court has held that state appropriations for an authority’s operating costs, pledges of the cooperation of state agencies and officials, and other actions that encourage an authority to undertake works of internal improvement do not flout the constitutional ban.⁴¹

Judicial machinations

While the legislature has employed dummy corporations and authorities to avoid application of the internal improvements clause, the court, in addition to approving those legislative efforts, has used its own tools to work around the clause’s constraints.

The ostensible judicial standard that emerged from *Froehlich* and *Donald* asks two questions:

1. Does the project serve an essential governmental function?
2. Does sufficient private capital exist to satisfy the particular need?

But the court has rarely applied that standard consistently. For example, the court does not always insist on making a separate finding that private capital is insufficient. More to the point, the court’s approach to the first question—whether the project serves an essential governmental function—has grown increasingly flexible over time.

That increasing flexibility traces back to the court’s 1935 decision in *Appeal of Van*

40. The debt authorization under Wis. Const. art. VIII, § 7 (2) (a) 1. includes language specifying that the debt authorization applies “any other provision of this constitution to the contrary notwithstanding.” That may mean that the state can contract debt for projects that otherwise qualify as internal improvements—the court has not addressed that question head-on. Even assuming that to be true, however, the state is still prohibited from being “a party in carrying on such works.” *Id.* at art. VIII, § 10.

41. *Nusbaum*, 59 Wis. 2d at 437. The line between encouragement and becoming “a party in carrying on” works of internal improvement can be very fine.

Dyke.⁴² The *Van Dyke* case involved a Depression-era law designed to provide emergency unemployment relief. The law in part appropriated state funds to pay local units of government a percentage of their labor costs for public works projects undertaken to provide employment to the unemployed. The court upheld those payments as constitutional because the state's "primary purpose" was to provide unemployment relief, not to become a party in carrying on works of internal improvement.⁴³

In the dozen internal improvements cases decided since *Van Dyke*, the court upheld laws as constitutional in all but two cases. Several of those cases illustrate the court's tendency to develop and adapt *Van Dyke's* "primary purpose" standard to fit changing circumstances.

In *State ex rel. La Follett v. Reuter*,⁴⁴ the court's approach was accommodating when it upheld the state's direct participation in the construction of water pollution prevention and abatement facilities. The court said, "[W]e should endeavor to interpret the [internal improvements clause] in light of existing conditions, particularly when those conditions could not have been foreseen at the time the constitution was adopted."⁴⁵ Relying in part on *Van Dyke*, the court held that the state's construction of water pollution prevention and abatement facilities was proper because "matters pertaining to the abatement of water pollution are governmental functions of the state."⁴⁶

At the hands of the court in *Reuter*, what in *Donald* had "merely facilitate[d] the essential functions of government" was diluted to a mere "governmental function." Similarly, in *State ex rel. Warren v. Nusbaum*,⁴⁷ the court again relied in part on *Van Dyke* to further weaken the standard for internal improvements. *Nusbaum* held that the law creating the Wisconsin Housing Finance Authority, now WHEDA, did not run afoul of the internal improvements clause to the extent that the law involved the state in the construction of housing. The court found that the law at issue in *Nusbaum* did not entail the state's participation in housing construction because an independent authority, not the state, would be administering all housing programs. Nevertheless, the court went on to conclude that the construction of public housing does not constitute an internal improvement.

First, the court noted that over time it has had difficulty interpreting and applying the internal improvements clause, and in particular the abstract definition handed down in *Froehlich*.⁴⁸ Additionally, the *Nusbaum* court found that "[a]n examination of the [in-

42. 217 Wis. 528, 259 N.W. 700 (1935).

43. *Van Dyke*, 217 Wis. at 544.

44. 33 Wis. 2d 384, 147 N.W.2d 304 (1967).

45. *Reuter*, 33 Wis. 2d at 402 (quoting *Visina v. Freeman*, 252 Minn. 177, 193, 89 N.W.2d 635 (1958)).

46. *Id.* at 402–03.

47. 59 Wis. 2d 391, 208 N.W.2d 780 (1973).

48. *Nusbaum*, 59 Wis. 2d at 435.

ternal improvements clause] cases coming before this court over the last seventy years leads to the conclusion that both this court and the legislature have been cognizant of changing times and the ever-changing needs of the state and its people.”⁴⁹

Turning its attention to *Van Dyke*, the court determined that the *Van Dyke* court, “having found a public purpose, declared that the carrying on of works of internal improvement was merely incidental thereto or a means to achieve the desired result. Any resulting internal improvement was not the ultimate purpose.”⁵⁰ The court applied that analysis to the law at issue in *Nusbaum* and concluded that “the health, safety, and welfare of the people is the dominant purpose . . . , and the construction of public housing is incidental thereto.”⁵¹ The court determined there was no internal improvements violation because that “dominant purpose” constituted a “valid governmental function.”⁵²

Finally, in *Wisconsin Solid Waste Recycling Authority v. Earl*,⁵³ the court upheld a law creating the Wisconsin Solid Waste Recycling Authority and authorizing that authority’s construction of transfer stations and recycling facilities. Just as in *Nusbaum*, the *Earl* court held that an independent authority, not the state, was involved in the construction of transfer stations and recycling facilities. However, again just as in *Nusbaum*, the *Earl* court additionally concluded that such construction was not an internal improvement.

The court began its analysis by again striking the chord of changing times. In particular, according to the court, constitutional provisions that have the effect of limiting the legislature’s exercise of its policy-making function should be considered in the light of present conditions.⁵⁴ With that in mind, the *Earl* court relied on *Van Dyke*, *Reuter*, and *Nusbaum* for this proposition:

If a law is predominantly public in its aim, it will not be held to violate the internal improvements provision, in spite of the fact that the state carries on internal improvements incident to the main public purpose of the law.⁵⁵

The court found that the law at issue had the “legitimate public purpose of preserving the health, safety, and welfare of the people of our state,” and that purpose was the dominant purpose of the law.⁵⁶ The court reasoned, “Any internal improvement is not the ultimate purpose, but is merely the physical means for achieving that purpose.”⁵⁷

49. *Id.* at 435–36.

50. *Id.* at 436.

51. *Id.* at 436–37.

52. *Id.* at 437–38.

53. 70 Wis. 2d 464, 489 N.W.2d 648 (1975).

54. *Earl*, 70 Wis. 2d at 490.

55. *Id.* at 492, 235 N.W.2d 648 (1975).

56. *Id.* at 493–94.

57. *Id.* at 494.

A contrary decision

In 1987, the court rejected *Earl's* reasoning when it overturned a housing program in *State ex rel. Department of Development v. State Building Commission*.⁵⁸ That case dealt with a law empowering a state agency, not an independent authority, to make loans to private real estate developers to construct housing for persons of low or moderate income. The court treated as settled that the construction of housing constitutes an internal improvement because in 1948 the court had held that the construction of veterans housing was a prohibited work of internal improvement.⁵⁹ The court distinguished *Nusbaum*. While “both the reasons for the [housing] legislation and the goals sought to be achieved are almost identical and likewise show that a public purpose is demonstrated,” in *Nusbaum* an independent authority administered the housing programs, not the state.⁶⁰ Moreover, the court determined that the state’s role in *Nusbaum* constituted encouragement of, not participation in, internal improvements.⁶¹

After distinguishing *Nusbaum*, the court went further and explicitly rejected the primary or dominant purpose rationale as it evolved from *Van Dyke* to *Earl* in favor of the broad principle of general application established in *Froehlich* and *Donald*. The court reasoned that the primary or dominant purpose rationale renders the numerous amendments to the internal improvements clause meaningless:

It would have been thought strange, to say the least, had the court said of all the amendments to Article VIII, sec. 10 to facilitate travel and transport, such as the amendments permitting State involvement in highways, airports and port facilities that: “These amendments are not necessary. The real purpose of these expenditures is not to build roads, highways, port facilities or airports. The real public purpose is to allow people to travel and transport their goods which is essential to the welfare of the population and essential for the growth of the state.” Quite obviously, that would have been an absurd position for the court to take.

Yet, that is the very type of reasoning we are asked to follow now in saying that in becoming directly involved in the building of private housing for “low and middle income persons,” the State is not involved in housing but in providing a solution to the need for such housing by low and middle income persons.⁶²

Despite its logical appeal, the *State Building Commission* court’s rejection of the pri-

58. 139 Wis. 2d 1, 406 N.W.2d 728 (1987).

59. *State ex rel. Martin v. Giessel*, 252 Wis. 363, 31 N.W.2d 626 (1948). *Giessel* was the only other case since *Van Dyke* in which the court struck down a law based on the internal improvements clause. Following *Giessel*, the constitution was amended to include an internal improvements exemption for veterans housing.

60. *State Building Commission*, 139 Wis. 2d at 14–15.

61. *Id.* at 17–18.

62. *Id.* at 20–21.

mary or dominant purpose rationale did not last long. In 1996, the court again took up the issue of internal improvements and restored the primary or dominant purpose rationale in such a way as to call into question the continued vitality of the internal improvements clause itself.

The Miller Park case

Libertarian Party v. State,⁶³ can be seen as the culmination of the court's primary or dominant purpose rationale tracing back to *Van Dyke*, especially as that rationale was expressed in *Earl*. The *Libertarian Party* court did not discuss the reasoning of *State Building Commission*. Arguably, after *Libertarian Party*, there is no clear boundary separating the reach of the internal improvements clause from the public purpose doctrine.

Libertarian Party involved a challenge on constitutional grounds to 1995 Wisconsin Act 56, the Stadium Act, which provided for the creation of one or more local baseball park districts for the construction of professional baseball park facilities. The Stadium Act laid the foundation for the ultimate construction of Miller Park to replace Milwaukee County Stadium as home to the Milwaukee Brewers. The state's participation in construction of the facilities was manifest. Under the act, the state was authorized to provide certain services to a baseball park district, including engineering, architectural, project management, and other building construction services.⁶⁴ The court upheld the Stadium Act on several grounds, including that the law served a public purpose and did not contravene the internal improvements clause.

In upholding the Stadium Act, the court first determined that the act served a public purpose. The public purpose doctrine does not appear in the constitutional text. Instead, it is an extratextual, "basic constitutional tenet mandating that public appropriations may not be used for other than public purposes."⁶⁵ According to the court, "The concept of public purpose is a fluid one and varies from time to time, from age to age, as the government and its people change."⁶⁶ What constitutes a public purpose therefore changes with time depending upon "what the people expect and want their government to do."⁶⁷ The court has consistently held that "what constitutes a public purpose is, in the first instance, a question for the legislature to determine" and the court affords great weight to the legislature's determination.⁶⁸ The court may overrule the legislature's finding that

63. 199 Wis. 2d 790, 546 N.W.2d 424 (1996) (per curiam).

64. 1995 Wisconsin Act 56, section 6.

65. *Libertarian Party*, 199 Wis. 2d at 809. As already discussed, the constitution was amended in 1969 authorizing the state to incur debt to "acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, railways, buildings, equipment or facilities for public purposes." That is different from the public purpose doctrine, which is a judicially created principle of constitutional law requiring that taxes may be levied and public funds may be expended only for public purposes.

66. *Id.* (quoting *State ex rel. Warren v. Rueter*, 44 Wis. 2d 201, 211, 170 N.W.2d 790 (1969)).

67. *Id.*

68. *Id.* at 810.

an act serves a public purpose only if a government expenditure is “manifestly arbitrary or unreasonable.”⁶⁹

In the Stadium Act, the legislature expressly declared that the law served “a state-wide public purpose by assisting the development of a professional baseball park in the state for providing recreation, by encouraging economic development and tourism, by reducing unemployment and by bringing needed capital into the state for the benefit and welfare of people throughout the state.”⁷⁰ The court credited that declaration and itself found that providing for recreation is a public purpose and a matter for legislative discretion.⁷¹ Therefore, the court concluded that the Stadium Act was sufficiently public in nature to withstand constitutional scrutiny under the public purpose doctrine. The fact that a private entity—the Milwaukee Brewers—would benefit from the Stadium Act did not destroy the “predominant public purpose” of the act.⁷²

The court’s internal improvements analysis reflected its public purpose analysis in almost every respect. After determining that the Stadium Act had a “predominant public purpose,” the court held that the act did not violate the internal improvements clause because any construction or related activities in which the state engaged under the act were “incident to a predominantly governmental purpose.”⁷³ Like the public purpose doctrine, the court reasoned that what constitutes a “predominantly governmental purpose” changes with time.⁷⁴ The court reiterated that sports facilities yield recreational benefits and noted that in virtually every case addressing the matter, the construction of a stadium for a professional sports team was held to constitute “a public purpose for which public expenditures could be legally undertaken.”⁷⁵ Finally, again emphasizing the legislative determination that the act served a statewide public purpose, the court concluded, “The reduction of unemployment, the promotion of tourism, and the encouragement of industry are all predominately governmental purposes sufficient to avoid a violation of the internal improvements clause.”⁷⁶

Since *Libertarian Party* was decided, two more laws were enacted that laid the groundwork for the state’s participation in the renovation or construction of a professional sports arena. 1999 Wisconsin Act 167 led to a major renovation project at Lambeau Field, home of the Green Bay Packers. More recently, 2015 Wisconsin Act 60 prepared the way for the

69. *Id.* at 812

70. 1995 Wisconsin Act 56, section 51; *Libertarian Party*, 199 Wis. 2d at 810.

71. *Libertarian Party*, 199 Wis. 2d at 812.

72. *Id.* at 810.

73. *Id.* at 814 and 816. Significantly, the court quoted *Earl* to the effect that a law will not be held to violate the internal improvements clause if it is “predominantly public” in its aim. *Id.* at 814 (quoting *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464, 492 489 N.W.2d 648 (1975)).

74. *Id.*

75. *Id.* at 815 (quoting *Lifteau v. Metropolitan Sports Facilities Commission*, 270 N.W.2d 749, 753–54 (Minn. 1978)).

76. *Id.* at 816.

new multipurpose arena in downtown Milwaukee, which, among other things, serves as the home of the Milwaukee Bucks. Both of those acts contained a legislative declaration of statewide public purpose that was virtually identical to the legislative declaration that the *Libertarian Party* court relied on in upholding the Stadium Act.

Conclusion

The internal improvements clause has been thought to bedevil debate. Researchers are certainly apt to regard it as a shapeshifter or mischievous gremlin of state constitutional law. What began in *Froehlich* and *Donald* as a sweeping prohibition against state participation in public works other than works that merely facilitate the essential functions of government, the court in *Libertarian Party* appears to have fused with the malleable and amorphous public purpose doctrine. That has led to incongruous results. The state is forbidden from assisting with the construction of a levy to protect lives and property but not from assisting with the construction of recycling facilities. Public housing is off limits, but assisting in the construction of a professional baseball park is not. While proper use of an authority will typically be called fair, the state's direct participation in a project that does not have a "predominantly governmental purpose" will be called foul.

However, in *Libertarian Party* a "predominantly governmental purpose" under the internal improvements clause looks exactly like a "predominant public purpose" under the public purpose doctrine. The court has always treated the public purpose doctrine and the internal improvements clause as separate and distinct inquiries. But, in *Libertarian Party*, the two constitutional standards appear as a distinction without a difference for purposes of the internal improvements clause: "If a law is predominantly public in its aim, it will not be held to violate the internal improvements [clause]."⁷⁷ That statement in *Libertarian Party*, quoting *Earl*, has been followed by more than 20 years of silence from the court. The difficulty for the legislature in the midst of that silence is determining what the court may call a ball or a strike when the legislature decides to play ball. For the time being, the public purpose doctrine appears to demarcate the strike zone in the internal improvements arena. ■

77. *Id.* at 814 (quoting *Earl*, 70 Wis. 2d at 492).

